

Rod D. Margo (State Bar No.: 097706)
Jennifer J. Johnston (State Bar No.: 125737)
CONDON & FORSYTH LLP
1901 Avenue of the Stars, Suite 850
Los Angeles, California 90067-6010
Telephone: (310) 557-2030
Facsimile: (310) 557-1299
Email: rmargo@condonlaw.com
Email: jjohnston@condonlaw.com

6 Attorneys for *Specially Appearing Defendant*
BUMBO (PTY) LTD.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 WENDY D. WHITSON, individually
12 and on behalf of all others similarly
situated.

13 | Plaintiffs,

14

15 BUMBO, BUMBO LIMITED, BUMBO
16 (PTY) LTD.; TARGET
CORPORATION; and DOES 1 to 20.

17 | Defendants.

Case No. CV-07-5597 MHP

**REPLY TO PLAINTIFF'S
OPPOSITION TO DEFENDANT
BUMBO (PTY) LTD'S *AMENDED*
MOTION TO QUASH SERVICE
AND DISMISS FOR
INSUFFICIENT SERVICE OF
PROCESS AND LACK OF
PERSONAL JURISDICTION**

Date: March 24, 2008
Time: 2:00 p.m.
Place: Courtroom of the Hon.
Marilyn Hall Patel

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INTRODUCTION

Defendant Bumbo (Pty) Ltd. (“Bumbo-Pty”) hereby files its reply to plaintiff’s opposition to defendant Bumbo (Pty) Ltd’s amended motion to quash and motion to dismiss (the latter hereinafter “Opposition”). Instead of addressing the open and obvious service issues in Bumbo-Pty’s amended motion, plaintiff is attempting to “back door” Bumbo-Pty into this lawsuit by claiming effective service on Bumbo-Pty or, failing that, asking the Court to override and negate the applicable rules of service.

Plaintiff has the burden of proof to establish that she has effected service of the summons and complaint on Bumbo-Pty and has failed to meet it. Plaintiff quite simply has failed to serve Bumbo-Pty, a South African company, in a way that is consistent with U.S. and South African law and is now asking the Court to ratify plaintiff's deficient service by saying, "Gosh, it ought to be okay." Accordingly, the Court should not accept plaintiff's invitation because plaintiff made absolutely no effort to effect service properly on Bumbo-Pty, a foreign company with its headquarters and manufacturing site outside the U.S. The Court should reject such an invitation to mischief at the expense of basic procedural law with which all litigants are expected to comply.

Based also on the plaintiff's irregularly attempted service on a non-existent entity that is the subject of the hearing scheduled on March 10, 2008, and taken under submission, it appears that plaintiff's counsel would instead prefer to attempt to "wear down" Bumbo-Pty to the point where Bumbo-Pty tires of insisting that all applicable rules of civil procedure be scrupulously followed. Based upon plaintiff's repeated unwillingness to follow the most fundamental rules in service of process against a non-U.S. company and plaintiff's repeated failure to establish personal jurisdiction of Bumbo-Pty in this matter, this action should be dismissed in its entirety as against Bumbo-Pty.

1 **ARGUMENT**2 **I**3 **PLAINTIFF'S OPPOSITION FAILS TO ESTABLISH**
4 **THAT PLAINTIFF HAS PROPERLY SERVED BUMBO (PTY) LTD.**

5 Service of process requirements must be strictly enforced so that all litigants
 6 are on an equal playing field. In objecting to a motion to quash service, plaintiff
 7 has the burden of assuring the Court that a defendant has been properly served in a
 8 lawsuit. Plaintiff's attempt at service here has failed to comply with the most
 9 fundamental rules and is fatally ineffective. Realizing this, her opposition
 10 misstates both U.S. and South African law, and plaintiff provides no support for
 11 her erroneous interpretation that it is "reasonable, then, to assume that others
 12 [rather than just the sheriff under South African law] may effect service." (See
 13 Opposition, at pg. 2, line 11.)

14 Curiously, plaintiff tries to shift the burden back onto Bumbo-Pty by arguing
 15 that Bambo-Pty's motion did not cite case law in support its allegation that service
 16 in South Africa must be accomplished by a sheriff, *see id.*, pg. 2, lines 5-7,
 17 although they admit by implication the South African Uniform Rules of Court
 18 (hereinafter "South African Uniform Rules") provide exactly that. (See South
 19 African Uniform Rules attached as Exhibit "A" to Declaration of Jeffrey M. Bortz
 20 in Support of Reply to Plaintiff's Opposition to Defendant Bumbo (Pty) Ltd's
 21 Amended Motion to Quash and Motion to Dismiss (hereinafter "Bortz
 22 Declaration"), referenced at para. 3 therein; and Exhibit "B" to Declaration of
 23 Jennifer J. Johnston in Support of Reply to Plaintiffs' Opposition to Defendant
 24 Bumbo (Pty) Ltd's Amended Motion to Quash Service and Dismiss for Insufficient
 25 Service of Process and Lack of Personal Jurisdiction (hereinafter "Johnston
 26 Decl."), referenced at para. 3 therein.)

27 At the outset it may be observed that lack of case law addressing a specific
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1 rule promulgated by the Chief Justice of South Africa and expressly made
 2 applicable to all proceedings in South Africa does not demonstrate that the rule is
 3 so variable that anything goes but shows, rather, that no reasonable person would
 4 dispute the plain meaning of such a clearly articulated rule.

5 Even though Bumbo-Pty does not have the burden of proving service was
 6 not made, Bumbo-Pty nonetheless has obtained a declaration from a South African
 7 practitioner with forty-years' experience practicing before South African courts.
 8 This declarant is not counsel to any party in this action and was not made familiar
 9 with the factual background of the claims made in this case or with how plaintiff
 10 attempted to serve Bumbo-Pty. (*See* Bortz Decl., para. 1.)

11 As this declarant makes clear, the South African Uniform Rules provide that
 12 only the sheriff or a specifically designated representative from his office may
 13 effect personal service of any process on a company defendant. (*See* Bortz Decl.,
 14 para. 5.) The sheriff cannot accept judicial documents for service from a private
 15 litigant but must be expressly directed to effect service only by the court with
 16 jurisdiction in the geographical district in which the South African company is
 17 registered or has its principal office, and thus a plaintiff has the obligation to make
 18 a formal request of the responsible court to so direct the sheriff. (*See* Bortz Decl.,
 19 paras. 6 and 9) The sheriff must not only personally deliver the copy of the
 20 process but must also inform the "responsible employee" of the company to be
 21 served of the "nature and contents" of the document(s) to be served, as evidenced
 22 by an affidavit returned by the sheriff. (*See* Bortz Decl., paras. 7 and 8.)
 23 Absolutely none of this was done by plaintiff here; rather, she merely asked an
 24 employee (who was neither a sheriff nor specifically designated by the local
 25 sheriff) of a company nearby to walk over a copy of the summons and complaint,
 26 and this man merely left it with the first person he saw.

27 In a further desperate act to mislead the Court, the Declaration of Jeremy R.
 28

1 Fietz, in Support of Plaintiff's Opposition to Defendant Bumbo (Pty) Ltd's Motion
2 to Quash and Motion to Dismiss, attached copies of e-mail messages from
3 plaintiff's counsel to Bumbo-Pty but can point to no reply from any Bumbo-Pty
4 representative, despite Mr. Fietz's claim that there are "emails between" plaintiff's
5 counsel and Bumbo-Pty. Plaintiff's latest representation to this Court, even if it
6 were based on fact as it is not, is unavailing, because service by electronic means
7 such as by e-mail or facsimile or letter under these circumstances is simply not
8 valid service under South African law. (See Bortz Decl., para. 4.)

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II

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PLAINTIFF HAS FAILED TO COMPLY WITH RULE 4 OF THE FEDERAL RULES OF CIVIL PROCEDURE TO EFFECT SERVICE OF PROCESS ON BUMBO (PTY) LTD.

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Bumbo-Pty is a company organized under the laws of South Africa with its principal and *only* place of business in South Africa. Since Bumbo-Pty is located in South Africa, service of process can *only* be effected by following Rule 4, which is captioned "Service," of the South African Uniform Rules. (See Bortz Decl., para. 3.)

In claiming she has effected service, plaintiff has further and unequivocally failed to comply with Rule 4 of the Federal Rules of Civil Procedure (hereinafter "FRCP" or "Fed. R. Civ. P."). The FRCP pertaining to service upon foreign corporations provide that service shall be made upon a domestic or foreign corporation at a place not within any judicial district of the United States, in any manner prescribed by FRCP Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i). (See Fed. R. Civ. Proc. Rule 4(h)(2).) In relevant part, FRCP Rule 4 specifically provides as follows:

1 Unless federal law provides otherwise, an individual -- other
 2 than a minor, an incompetent person, or a person whose waiver has
 3 been filed -- may be served at a place not within any judicial district
 of the United States:

4 (1) by any internationally agreed means of service
 5 that is reasonably calculated to give notice, such as those
 6 authorized by the Hague Convention on the Service
 Abroad of Judicial and Extrajudicial Documents;

7 (2) if there is no internationally agreed means, or if
 8 an international agreement allows but does not specify
 9 other means, by a method that is reasonably calculated to
 give notice:

10 (A) *as prescribed by the foreign country's*
 11 *law for service in that country in an action in its*
 12 *courts of general jurisdiction;*

13 (B) as the foreign authority directs in
 14 response to a letter rogatory or letter of request; or

15 (C) *unless prohibited by the foreign*
 16 *country's law, by:*

17 (i) delivering a copy of the summons
 18 and of the complaint to the individual
 personally; or

19 (ii) using any form of mail that the
 20 clerk addresses and sends to the individual
 and that requires a signed receipt; or

21 (3) by other means not prohibited by international agreement,
 22 as the court orders.

23 Fed. R. Civ. P. 4(f). (Emphasis added.)

24 South Africa is not a party to the only relevant international convention on
 25 service, the Hague Service Convention. (See the Status Table of the Hague Service
 26 Convention attached as Exhibit "A" to Johnston Decl., referenced at para. 2
 27 therein; Bortz Decl., para. 2.) Thus, service under FRCP Rule 4(f)(1) cannot be

1 effected. Further, FRCP Rule 4(h)(2) clearly states that personal service on a
 2 foreign corporation is not considered good service. Plaintiffs are required to serve
 3 Bumbo-Pty either under FRCP Rule 4(f)(2)(A) or (B).

4 Although it is defendant's contention that a letter rogatory under FRCP Rule
 5 4(f)(2)(A) is the only legal and appropriate manner in which to serve Bumbo-Pty,
 6 plaintiff has certainly not even attempted to comply with South Africa's very
 7 specific personal service requirements as required by FRCP Rule 4(f)(2)(A).
 8 Indeed, plaintiff realizes this and does not even cite to the FRCP in defending her
 9 attempted service. Rather, her Opposition cites only to FRCP Rule 4(f)(3), which
 10 permits the Court to craft some other means of effective service, and plaintiff
 11 attempts to use this residual clause as authority for the Court's ignoring the clear
 12 meaning of the FRCP and the South African Uniform Rules.

13 Plaintiffs also have not served the summons and complaint in compliance
 14 with any order of this Court. Instead, she seeks to coopt the Court into ratifying
 15 her improper service after the fact. Plaintiff further has made no showing of any
 16 effort to comply with FRCP Rule 4(2)(A) or (B). Instead, she blatantly ignores the
 17 rules and wants to invite the Court to use its plenary power to subvert and negate
 18 the plain directives of the FRCP applicable to all other litigants in federal court and
 19 allow plaintiff here to proceed. FRCP Rule 4(f)(3) clearly was not intended to be
 20 so abused or absurdly interpreted, as plaintiff will have it.

21 Simply put, plaintiff is required to serve Bumbo-Pty, a South African
 22 company, either under subsection FRCP Rule 4(f)(2)(A) [method prescribed by
 23 foreign country's law of service] or FRCP Rule 4(f)(2)(B) [as foreign authority
 24 directs in response to letter rogatory]. Plaintiff has not attempted the letter
 25 rogatory process, despite the fact that counsel in other related cases have done so
 26 and have so informed counsel for plaintiff here. (*See* Johnston Decl., para. 5.) The
 27 South African Uniform Rules specifically state that service of process in South
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1 Africa on a company is effected only as follows:

2 Service of any process of the court directed to the sheriff . . .
 3 any document initiating application proceedings shall be effected by
 4 the sheriff in one or other of the following manners:

5 . . .
 6 (v) in the case of a corporation or company, by
 7 delivering a copy to a responsible employee thereof at its
 8 registered office or its principal place of business within
 9 the court's jurisdiction, or if there be no such employee
 10 willing to accept service, by affixing a copy to the main
 11 door of such office or place of business, or in any manner
 12 provided by law.

13 South African Uniform Rules, Rule 4(1)(a), attached as Exhibit "A" to Bortz Decl.
 14 and as Exhibit "B" to Johnston Decl.

15 The law of South Africa simply does not recognize any other form of service
 16 in these circumstances on a company in South Africa to be legitimate. (*See* Bortz
 17 Decl., para. 3.)

18 Plaintiff and her counsel have failed to offer any explanation of their blatant
 19 disregard of FRCP Rule 4 and have ignored advice of counsel in related cases.
 20 Plaintiff here should not be rewarded for her continuous and blatant disregard of
 21 the basic rules of civil procedure, as here.

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 23 **III**

24 **THE DOCTRINE OF INTERNATIONAL COMITY PROVIDES THAT**
 25 **THE INTEREST OF SOUTH AFRICA IN SERVICE OF PROCESS INSIDE**
 26 **ITS BORDERS SHOULD BE PARAMOUNT.**

27 The U.S. Supreme Court has invoked comity as a central rationale, the

1 justification and the model, for its decisions involving foreigners in U.S. litigation.
 2 *See, e.g., Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S.
 3 Ct. 2104, 2108, 100 L. Ed. 2d 722, 731 (1988) (“we almost necessarily must refer
 4 to the internal law of the forum state” to find a service of process standard if a
 5 treaty “does not prescribe” it); *Societe Nationale Industrielle Aerospatiale v.*
 6 *United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 539-40, and n.
 7 25, 107 S. Ct. 2542, 2553, and n. 25, 96 L. Ed. 2d 461, 481 and n. 25 (1987)
 8 (holding that compliance with the Hague Evidence Convention is mandatory, not
 9 optional, because of comity). In *Aerospatiale*, the Supreme Court observed that
 10 the substantial question in that case was whether “there is in fact a true conflict
 11 between domestic and foreign law.” *Société Nationale Industrielle Aérospatiale*,
 12 *supra*, 482 U.S. at 555, 107 S. Ct. at 2562, 96 L. Ed. 2d at 491 (1987); *see also*
 13 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S. Ct. 2891, 2910,
 14 125 L. Ed. 2d 612, 640 (1993) (citing *Aerospatiale* for same).

15 Even assuming *arguendo* that plaintiffs’ form of service could be excused
 16 under the FRCP if attempted on a domestic entity, the refusal of South Africa to
 17 countenance less than sufficient service under the South African Uniform Rules
 18 means that this Court should defer to the South African law under the doctrine of
 19 international comity. A U.S. court should not reward plaintiff for her continuous
 20 and blatant disregard of the law of the country wherein Bumbo-Pty is located, as
 21 here, because such disregard of another sovereign’s law would unnecessarily and
 22 adversely affect the foreign relations between the two national governments.

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IV

**PLAINTIFF HAS FAILED TO ESTABLISH FACTS
SUFFICIENT TO SUPPORT AN ASSERTION OF PERSONAL
JURISDICTION OVER BUMBO (PTY) LTD.**

Plaintiff argues that Bumbo-Pty “completely misses the mark in its analysis of personal jurisdiction.” (Opposition, at pg. 3, lines 4-5.) Plaintiff then quotes extensively from this court’s decision in *Seltzer Sister Bottling Co., Inc. v. SourcePerrier*, S.A.. 1991 WL 2729273 (N.D. Cal.) Counsel remarks that somehow Bumbo-Pty missed the “all fours” opinion of the court in its legal research. (Opposition, at pg. 9, lines 11-12.)

The court in *Seltzer* addressed an action pursuant to section 43(a) of the Lanham Act, alleging unfair competition by means of false or deceptive advertising. In *Seltzer*, defendant's motion to dismiss for lack of personal jurisdiction under FRCP Rule 12(b)(2) was denied. However, the facts in *Seltzer* vary greatly from the case at hand.

The *Seltzer* action stemmed from a voluntary recall of Perrier bottled water in the United States after certain bottles were found to obtain trace amounts of benzene. The plaintiff there alleged that since Perrier was marketed as “naturally sparkling,” this advertising was false and misleading in violation of the Lanham Act. The *Seltzer* court found that Great Waters of France, a Connecticut corporation, was created to serve as defendant’s exclusive exporter and distributor of Perrier in the United States. This was found to be part of an American initiative by defendant concentrating on certain geographical areas, including the state of California, since these areas represented nearly two-thirds of American consumption. Further, it was found that California was a key segment of defendant’s mineral water market. Moreover, “out of the total dollar volume of \$118 million for Perrier water sold in the United States in 1989, five hundred

1 thousand dollars (\$500,000) of those sales were generated by San Francisco
 2 County alone.” The *Seltzer* court found that “[t]hese facts do not evidence simply
 3 a ‘mere awareness’ on the part of Source Perrier that certain bottles of Perrier
 4 water were swept into California by the stream of commerce. Instead, they
 5 evidence an intent to channel that stream, and to shape it and ensure its growth.”
 6 *Seltzer Sister Bottling Co., Inc.*, 1991 WL 279273 at *6.

7 Unlike the *Seltzer* case, there has been no showing here that Bumbo-Pty
 8 focused on the California market. Bumbo-Pty did not create a company to serve as
 9 its distributor in California, or anywhere else in the United States.

10 Without repeating the same arguments from defendant’s original motion to
 11 set aside the default originally scheduled to be heard on March 10, 2008, and now
 12 taken under submission, the pertinent facts have not changed: Bumbo (Pty) Ltd.
 13 has taken no action purposely to avail itself of the California market; Bumbo (Pty)
 14 Ltd. has no offices, agents, or distributors in California; Bumbo (Pty) Ltd. has no
 15 address or telephone number in California; Bumbo (Pty) Ltd. has no real property
 16 in California. Further, unlike the finding in *Seltzer*, there is not a shred of evidence
 17 that Bumbo (Pty) Ltd. intended to focus its marketing and sales in California.
 18 There has been no representation made that there was a higher percentage of sales
 19 in California than in any other state. Further, plaintiff has not shown that Bumbo-
 20 Pty had *any* role in marketing and distribution in California.

21 Plaintiff’s representation that the *Seltzer* case is analogous to the case
 22 at hand is not enough to make it so; the facts are inapposite and the holding is not
 23 relevant here.

24 CONCLUSION

25 Plaintiff argues that even if she did not follow either U.S. or South African
 26 law of service, it should make no difference. She invites the Court to collude with
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1 her in nullifying the law governing service that all other litigants in federal court
 2 must follow, as set forth in the FRCP.

3 The Court should reject plaintiff's self-serving invitation. Bumbo-Pty has
 4 not been served in this action, has not appeared in this action and does not have
 5 any contacts, let alone constitutionally required minimum contacts, with the forum
 6 state of California.

7 Bumbo-Pty accordingly hereby requests that the summons and complaint
 8 hand-delivered by an individual not designated by the local sheriff, and thus
 9 insufficient as a matter of South African law, be quashed, and Bumbo-Pty be
 10 dismissed from this action.

11
 12 Dated: March 10, 2008

CONDON & FORSYTH LLP

13 By: s/Jennifer J. Johnston

14 ROD D. MARGO
 15 JENNIFER J. JOHNSTON

16 Attorneys for *Specially Appearing*
 17 Defendant
 18 BUMBO (PTY) LTD.

CONDON & FORSYTH LLP
 1901 Avenue of the Stars, Suite 850
 Los Angeles, California 90067-6010
 Telephone: (310) 557-2030